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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES JUSTIN KELLER,

Defendant and Appellant.

D072199, D072974

(Super. Ct. Nos.  
SCD264642, SCE326416)

CONSOLIDATED APPEALS from judgment and order of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed and remanded with directions.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Melissa Mandel, Tami F. Hennick and Genevieve Rose Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Charles Justin Keller of two counts of assault with a deadly weapon (Pen. Code,<sup>1</sup> § 245, subd. (a)(1)) and found true allegations that he committed each assault for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)). Keller admitted he had suffered a prior prison conviction (§§ 667.5, subd. (b), 668), a serious felony prior conviction (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)), and three strike prior convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 668, 1170.12).

After the trial court sentenced Keller a first time, an appeal ensued (Case No. D072199). The Department of Corrections and Rehabilitation informed the trial court of certain sentencing errors, which the court corrected by resentencing Keller to 17 years eight months in state prison as follows: nine years on count 1 (two years doubled plus five years for the gang enhancement), plus three years eight months on count 2, plus five years on the serious felony strike prior under section 667, subdivision (a). The sentence was to run consecutively to the prison term Keller was already serving. Keller again appealed (Case No. D072974), and we consolidated both appeals under Case No. D072199.

Keller contends: (1) insufficient evidence supports the gang enhancements because the gang at issue here, the "Deadskins" (sometimes referred to as "DS") is a prison gang as opposed to a criminal street gang; (2) alternatively, there was insufficient trial evidence about the Deadskins' primary activities; (3) the court misinstructed the jury

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

by stating the gang's primary activities included robbery and burglary; (4) the gang expert usurped the jury's role by testifying about the law regarding gangs, relying on inadmissible hearsay of the gang's bylaws, and improperly bolstering other witnesses' testimony; (5) Keller received ineffective assistance of counsel; and (6) there was cumulative error. In a supplemental brief, Keller argues we should remand the matter for resentencing under Senate Bill No. 1393 (2017-2018 Reg. Sess.), which was signed into law during the pendency of this appeal. This last argument has merit, but we reject the remaining contentions. Accordingly, we affirm the judgment and remand the matter for resentencing.

#### FACTUAL AND PROCEDURAL BACKGROUND

R.H. testified that in September 2015, he and J.S. were cellmates in protective custody in the San Diego Central Jail. One morning, inmate Kevin Stribling entered their cell and demanded that R.H. pay Stribling's gang, the Deadskins, in order for R.H. to remain in protective custody. R.H. rejected that ultimatum and Stribling left. Minutes later, Stribling returned with Israel Ontiveros<sup>2</sup> and tried to convince R.H. to give the Deadskins some money for phone calls, food, hygiene products and, in R.H.'s words, for "[w]hatever it is that they can benefit as a group off of other inmates." Stribling threatened R.H. to pay or find out "what time it is." R.H. testified that expression was "street terminology for something is about to happen to you." After R.H. again refused to give them anything, the two men left. Knowing the Deadskins extorted, beat and raped

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<sup>2</sup> Keller was tried with codefendant Ontiveros, who is not an appellant in this case.

other inmates, R.H. was afraid the Deadskins would attack him inside his cell; therefore, he stood outside. Nevertheless, Ontiveros pushed R.H. into the cell and attacked him there, while Keller entered the cell and attacked J.S. Three more inmates, including Stribling and John Cummings, joined in punching and kicking R.H. Ontiveros carried a shank, which Stribling used to stab R.H. and J.S. The attackers, some of whom had gang tattoos, yelled, "Deadskins." The attack ended when someone yelled, "Police." Ontiveros threw the shank in the toilet in R.H.'s cell. R.H. received cuts on his chin, hands and foot. J.S. suffered a black eye and scrapes to his head and legs.

The San Diego County Sheriff's Department deputy who was assigned to the San Diego Central Jail testified that when deputies at the jail realized that the incident was underway, they locked down the unit. The deputy immediately identified the individuals who were leaving R.H.'s cell, including Keller and Ontiveros. The parties stipulated at trial that R.H., J.S., Keller and Ontiveros were housed in protective custody that day. Following the incident, those involved, including Keller, were taken to a holding cell and questioned about it.

R.H. later identified Keller, Ontiveros, Cummings, and Stribling in photo lineups. J.S. identified those same attackers in photo lineups. At trial, R.H. also identified the attackers and described the attack as portrayed in a surveillance video that was shown to the jury. J.S. testified he knew some of his attackers were Deadskins members because of their tattoos.

San Diego County Sheriff Detective Jesus Lizarraga, the lead investigator in the case, was working with the detentions gang unit for the previous three years. He

investigated at least 20 Deadskins crimes and interviewed its members and associates, their victims, and also witnesses of the crimes. Detective Lizarraga testified as an expert that the Deadskins operate in jails, including in protective custody, where certain inmates are housed for their safety because of their medical condition, race, or status as either former law enforcement officials or witnesses against gang members. Started around 2006 or 2007, the Deadskins includes "members of the San Diego Skinheads and Lakeside Gangsters." The Deadskins use a numbering system to keep track of their members, some of whom tattoo the gang's logo and their membership numbers on their bodies. Many of the gang's over 80 members have gang names or monikers, and they operate both in custody and on the streets. The expert developed a course to train new deputies about the Deadskins.

The prosecutor asked the expert on direct examination, "Now, what type of activities do the Deadskins engage in in jail? What's the point of having this gang?" The expert replied: "In the jail, basically, they assault—assault is their number one crime they commit in the jails. They assault other inmates. . . . If they have more individuals that are members of the Deadskins than other inmates that don't belong to these gangs, they fear these guys. They're outnumbered, basically."

The expert testified that law enforcement seized the Deadskins' bylaws from an incarcerated high ranking Deadskins member. The bylaws instructed the members how

to act both inside and outside of jail or prison.<sup>3</sup> The expert said that "[the Deadskins] do hang out together outside of custody, and they do have their rules for outside in the streets." The People argued the bylaws were highly probative and admissible to show the Deadskins had a formal structure and common rules.

The defense objected that the bylaws were hearsay, their origins were unreliable, and their admission would violate Keller's constitutional right to confrontation because its author was unavailable for cross-examination. The defense further argued the bylaws' prejudicial nature outweighed their probative value under Evidence Code section 352.

The court ruled the bylaws were admissible and more probative than prejudicial; moreover, any constitutional claim was curable with this limiting instruction, which it gave the jury: "You may consider evidence of Deadskins bylaws, . . . for the limited purpose of proving the gang enhancement."

The expert testified that Keller was an original Deadskins leader and a "shot caller," defined as someone with authority and power over other inmates. Keller "has the ultimate say on what goes on with that gang, and he's the one that's able to bring new members in. If somebody wants to bring a new member into the gang, [] Keller has to approve that for membership." Keller has a gang tattoo, was involved in gang crimes, and was known to many inmates as a Deadskins member.

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<sup>3</sup> One bylaw states, "No homosexuality whatsoever." Another states, "Do not put yourself in a situation where we can be looked down upon. Do not turn down fades ever." The expert explained that a "fade" is a fight. A third bylaw states: "Don't disrespect yourself or feel disrespected. If you feel disrespected, get off." The expert explained, "That means if you feel disrespected by anybody, fight."

The expert testified that the Deadskins' primary activities include assaulting other inmates with a deadly weapon or by force likely to produce great bodily injury, bank robbery and first degree burglary. He testified the Deadskins' predicate crimes included assaults with deadly weapon or force likely to produce great bodily injury. (§ 245, subd. (a)(4).) Specifically, in 2014, two Deadskins members committed an assault in a detention facility. A codefendant was convicted of battery with serious bodily injury (§ 243, subd. (d)) and another codefendant was convicted of committing riot (§ 404.6, subd. (c)), but neither crime is listed in section 186.22, subdivision (e).

During direct examination, the expert identified Keller and Ontiveros and described their assault of R.H. and J.S. as portrayed in the surveillance video. The defense several times objected that the video spoke for itself, and the court sustained some of those objections but overruled others.

## DISCUSSION

### *I. The Deadskins Gang Qualifies as a Criminal Street Gang Under Section 186.22*

Keller contends the Deadskins gang is not a criminal street gang within the meaning of section 186.22 subdivisions (a) and (b)(1), which "plainly refer to 'street' as opposed to 'prison' gangs." He also argues the Legislature intended for section 186.22 to address criminal street gangs, not prison or jail gangs. Keller further argues that "if the prosecution intends to bring a prison gang within the ambit of the gang statute, it must prove that the gang has some type of organizational ties or nexus to its members on the streets that are committing the crimes to benefit the [Deadskins] and placing the public in danger, consistent with [section 186.22's] legislative intent and [] stated purpose."

"[S]ection 186.22, also known as the Street Terrorism Enforcement and Prevention Act (the STEP Act or Act), was enacted in 1988 to combat a dramatic increase in gang-related crimes and violence. The Act imposes various punishments on individuals who commit gang-related crimes—including a sentencing enhancement on those who commit felonies 'for the benefit of, at the direction of, or in association with *any criminal street gang*.' ([§ 186.22, subd. (b)].) A criminal street gang, in turn, is defined by the Act as any 'ongoing organization, association, or group of three or more persons' that shares a common name or common identifying symbol; that has as one of its 'primary activities' the commission of certain enumerated offenses; and 'whose members individually or collectively' have committed or attempted to commit certain predicate offenses. ([§ 186.22, subd. (f)].) To prove that a criminal street gang exists in accordance with these statutory provisions, the prosecution must demonstrate that the gang satisfies the separate elements of the STEP Act's definition and that the defendant sought to benefit that particular gang when committing the underlying felony." (*People v. Prunty* (2015) 62 Cal.4th 59, 66-67.) Section 186.21 sets forth the legislative findings and intent of the Act.<sup>4</sup>

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<sup>4</sup> Section 186.21 states in part: "The Legislature hereby finds and declares that it is the right of every person, regardless of race, color, creed, religion, national origin, gender, gender identity, gender expression, age, sexual orientation, or handicap, to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals. It is not the intent of this chapter to interfere with the exercise of the constitutionally protected rights of freedom of expression and association. The Legislature hereby recognizes the constitutional right of every citizen to harbor and express beliefs on any lawful subject whatsoever, to lawfully associate with others who share similar beliefs, to petition lawfully constituted authority for a redress of perceived



Our analysis begins with Section 186.22, subdivision (f)'s own definition of the relevant term: "As used in this chapter, 'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated . . . having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." We conclude the Deadskins meets this statutory definition, as it is an organization with more than 80 persons, and it has a name and common symbol that its members recognize, including with tattoos. Detective Lizarraga testified the Deadskins commit assaults with a deadly weapon or by force likely to produce great bodily injury, a crime specified in section 186.22, subdivision (e)(1).

Contrary to Keller's restrictive interpretation, the plain text of section 186.22, subdivision (f) makes no distinction between prison and street gangs; therefore, we have no basis for reading that distinction into the statute. Rather, in interpreting a statute, we

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grievances, and to participate in the electoral process. [¶] The Legislature, however, further finds that the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected. The Legislature finds that there are nearly 600 criminal street gangs operating in California, and that the number of gang-related murders is increasing. The Legislature also finds that in Los Angeles County alone there were 328 gang-related murders in 1986, and that gang homicides in 1987 have increased 80 percent over 1986. It is the intent of the Legislature in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs."

are bound by its plain language. (*People v. Palacios* (2007) 41 Cal.4th 720, 728.) We are not authorized to rewrite the statute. (See *Conde v. City of San Diego* (2005) 134 Cal.App.4th 346, 351 ["in construing a statute, the court 'cannot create exceptions, contravene plain meaning, insert what is omitted, omit what is inserted, or rewrite the statute' "].)

## II. *Evidence of the Deadskins' Primary Activities*

Keller contends that "even assuming *arguendo* the Deadskins can be considered a street gang, the evidence was insufficient to prove the *primary activities* element of the gang statute." (Some capitalization omitted.) He specifically argues the People did not prove that the Deadskins " 'repeatedly and consistently' engage in the primary activity of assault, much less [bank] robbery, or burglary as the jury was instructed."

The People contend the expert's testimony provided substantial evidence that under section 186.22, subdivision (e), the Deadskins committed assaults with a deadly weapon or by force likely to produce great bodily injury in 2014 and also in the instant case.

Section 186.22 subdivision (e) states: "As used in this chapter, 'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of . . . or conviction of two of more of the following [enumerated] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of these occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." The crime committed

here, assault with a deadly weapon or by means of force likely to produce great bodily injury, is one of the crimes enumerated in section 186.22, subdivision (e).

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

The California Supreme Court held in *People v. Sengpadychith* (2001) 26 Cal.4th 316: "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v. Gardeley* (1996) 14 Cal.4th 605]. There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. (See

§ 186.22, subds. (e)(4) & (8).) The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies." (*Sengpadychith, supra*, at p. 324.)

Expert testimony is often used to help prove gang allegations. "While lay witnesses are allowed to testify only about matters within their personal knowledge [citation], expert witnesses are given greater latitude. 'A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.' [Citation.] An expert may express an opinion on 'a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' " (*People v. Sanchez* (2016) 63 Cal.4th 665, 675.)

We conclude that as in *Gardeley, supra*, 14 Cal.4th 605, the expert's testimony here sufficed to establish the gang's primary activities. He testified that while working in the detention gang unit for three years, he had investigated at least 20 Deadskins crimes, and interviewed its members and associates as well as victims and witnesses of the gang's crimes. He also knew enough about the Deadskins and their activities that he educated new deputies about them. Here, a proper foundation was laid for the expert's opinion regarding the Deadskins' primary activities. The expert's conclusions are also supported by R.H.'s testimony that the Deadskins committed assaults in jail, and by the nature of the attack upon R.H. and J.S. The attack involved concerted, apparently preplanned action

by Deadskins members against R.H., who had refused to follow the Deadskins' command to give them money.

The cases Keller relies on are inapplicable because in each one the testimony regarding primary activities was conclusory and insufficient. Further, those cases distinguish *People v. Gardeley*, *supra*, 14 Cal.4th 605, in which the expert's testimony sufficed to support a finding regarding the gang's primary activities. (*Sengpadychith*, *supra*, 26 Cal.4th at p. 324; accord, *In re Alexander L.* (2007) 149 Cal.App.4th 605, 612-613 [pointing out that in *Gardeley*, the gang expert's testimony was based on a proper foundation]; *People v. Perez* (2004) 118 Cal.App.4th 151, 160 ["No expert testimony such as that provided in [*Gardeley*] was elicited here."].)

### III. *Claims of Instructional Error*

Keller contends: "The trial court misinstructed the jury by including robbery and burglary in the jury instruction and thereby conflating the 'primary activities' with the 'pattern of gang activity' elements of the gang statute when there was no evidence to support these offenses[.]" (Some capitalization omitted.) Keller points out the gang expert "never testified to robbery or burglary being the chief activities of the [gang]."

The People argue that Keller forfeited this argument by failing to object to the instruction at trial.<sup>5</sup> The People alternatively concede the court erred by instructing the

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<sup>5</sup> The court instructed the jury on the gang allegations with a modified version of CALCRIM No. 1401: "A criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal: [¶] 1. That has a common name or common identifying sign or symbol; [¶] 2. That has, as one or more of its primary activities, the commission of the first degree burglary ([Pen. Code, §§ 459,

jury that the gang's primary activities included first-degree burglary and robbery because the evidence did not establish those were the Deadskins' "principal occupations" or that the Deadskins committed them "consistently and repeatedly." The People nonetheless argue any error was harmless because the jury instruction here properly included assault with a deadly weapon or by force likely to produce great bodily injury, a statutorily enumerated offense.

*People v. Fiu* (2008) 165 Cal.App.4th 360 is instructive for our analysis of this issue. There, the defendant contended the trial court erroneously took judicial notice of, and instructed the jury they could rely upon, a gang member's conviction of possession of an assault weapon (§ 12280, subd. (b)), which was not an enumerated predicate offense. The appellate court concluded the trial court erred in taking judicial notice of this offense and instructing the jury that it could be a predicate offense to establish a pattern of criminal activity. However, the error was harmless because the court had also taken judicial notice of and instructed the jury about two assaults with a deadly weapon or by force likely to produce great bodily injury, which qualified as the gang's primary activities. (*Fiu*, at pp. 387-388.) Likewise here, the court erred by instructing the jury that the Deadskins' primary activities included first degree burglary and robbery because

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460)), Robbery ([Pen. Code, § 211]), assault with force likely to produce great bodily injury ([Pen. Code, § 245, subd. (a)(4)]). [¶] AND [¶] 3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity. [¶] In order to qualify as a primary activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group." (Some capitalization omitted.)

no evidence showed the Deadskins engaged in those crimes consistently and repeatedly. However, any error was harmless as the jury instruction stated that one of the Deadskins' primary activities was committing assaults with a deadly weapon or by force likely to produce great bodily injury, and its members had committed that crime in 2014 and in the present case.

#### *IV. Challenges to the Gang Expert's Testimony*

Keller contends the gang expert committed several errors falling under three broad categories: (1) testifying regarding legal matters relating to section 186.22, thus invading the jury's role; (2) testifying regarding the Deadskins' bylaws, and (3) identifying the defendants and describing the jailhouse incident portrayed in the surveillance video. Keller alternatively argues that if his claims are forfeited because he did not object at trial to certain portions of the expert's testimony, we nonetheless should address the contentions on the merits as he received ineffective assistance of counsel. We agree Keller's contentions are forfeited but will address the claims on the merits to obviate the ineffective assistance claim.

##### *A. Expert's Testimony About the Gang Statute*

Keller contends the expert "improperly and repeatedly defined the law for the jury." He cites various instances in which the expert responded to the prosecutor's questions by mentioning section 186.22 and its definition of a criminal street gang. But

Keller does not separately analyze each instance.<sup>6</sup> After citing case law stating that an expert cannot opine about the law, Keller's analysis is limited to two sentences: "It was the trial court's responsibility to tell the jury what the law is including its interpretation, not [the expert's]. It was error to permit this testimony." We may deem Keller's challenge forfeited by this cursory argument. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116 [appellant must affirmatively demonstrate error through

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<sup>6</sup> We set forth the principal example of the expert's testimony that Keller challenges on appeal:

"[Prosecutor:] So, Detective, based upon—well, based upon your training and experience, what is a criminal street gang?

"[Expert:] A criminal street gang, that's a group of three or more individuals who have a common name or symbol, who are individually or collectively engaged in a pattern of criminal activity under [section] 186.22.

"[Prosecutor:] And [section] 186.22, is that the law?

"[Expert:] It is a—it is a—186.22 of the Penal Code Section, it is basically a law that states the requirements of how to identify a gang, how do you document a gang, what are the requirements.

"[Prosecutor:] And what do you mean by primary activities? What do you mean by that?

"[Expert:] The primary—you have 33 crimes listed under [section] 186.22. Some of those are crimes—I can't recite all of them, but I can tell you some of them: robbery, extortion, kidnapping, all the major crimes that these gangs commit. So we look for those crimes, and when we identify gangs, we try to see if these gangs are committing those crimes listed under [section] 186.22.

"[Prosecutor:] And does a gang have to have a common name or identifying sign or symbol?

"[Expert:] Yes, they do. According to the law, yes.

"[Prosecutor:] All right. And can a gang also be an association or an organization or even group of three or more people?

"[Expert:] Yes.

"[Prosecutor:] As long as it fits the other criteria under [] section 186.22?

"[Expert:] Yes."



reasoned argument and discussion of legal authority].) In any event, we would conclude any error in this respect is harmless.

"The definition of a statutory term is a matter of law on which the court should instruct the jury; it is not a subject for opinion testimony. [Citations.] . . . 'It is the court and not the witness which must declare what the law is, it not being within the province of a witness . . . .' [Citation.] [¶] There are two reasons why opinion evidence on the meaning of a statute is inadmissible. First, . . . leaving the definition of statutory terms to be proved or disproved in every case 'would lead to great uncertainty in the administration of justice.' [Citation.] Second, it is the duty of the trial judge to instruct the jurors on the general principles of law pertinent to the case [citation]; therefore the jury has no need for such opinion evidence from the witness." (*People v. Torres* (1995) 33 Cal.App.4th 37, 45-46.)

In *Torres, supra*, 33 Cal.App.4th 37, a gang expert testified that certain gang members were engaged in "collecting rent," meaning collecting money from the narcotics dealers in that particular neighborhood in exchange for the gang allowing them to sell narcotics there. (*Id.* at p. 43.) When asked on redirect examination how he would characterize the acts of collecting rent, the expert testified without objection: " 'Well, I would describe it as a robbery. My definition of robbery is taking of someone's personal property through force or fear with the immediate danger of something happening to you. I know that is taking place. That is what happened in this particular case. Then when you get extortion, yes, that is happening also, but it's a two-fold issue.' " (*Id.* p.44.) In answering a follow-up question, the expert stated his definition of extortion. (*Ibid.*) The

court held that "it was improper for [the gang expert] to testify as to the meaning of the terms robbery and extortion and to express the opinion the crimes committed in this case were robberies. Furthermore, under the facts of this case, expressing the opinion the crimes were robberies was tantamount to expressing the opinion defendant was guilty of robbery and the first degree felony murder." (*Id.* at pp. 47-48.) The court nonetheless concluded any error was harmless because sufficient evidence supported the convictions. (*Id.* at p. 52.)

Here, any error caused by the expert's challenged testimony about the law defining gangs was harmless beyond a reasonable doubt. The expert's testimony did nothing more than mention the gang statute by way of reference, as it is the source of law that guided his investigations. Unlike the expert in *Torres*, the expert here did not elaborate on the intricacies of the law or inappropriately opine on the defendants' innocence or guilt.

Furthermore, the court instructed the jury with CALCRIM No. 200 that it was required to follow the court's instructions regarding what the law states: "You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." The court instructed the jury with CALCRIM No. 1401, which tracks the language of section 186.22 regarding the requirements for finding a gang crime. It also instructed the jury with CALCRIM No. 226 that the jury may believe all, part, or none of any witness's testimony, and with CALCRIM No. 332 regarding how to evaluate expert witness testimony. We must presume the jurors followed those instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 431.) In light of the court's instructions, the jury could

not have based its verdict on the expert's passing statements regarding section 186.22; rather, it was required to rely on the court's explanation of the gang statute.

*B. Expert's Testimony Regarding the Bylaws*

Keller challenges the court's admission of the bylaws on some of the same grounds as in the trial court. He contends the court erred by allowing the expert to testify regarding the Deadskins' bylaws, and the expert "impermissibly conveyed hearsay to the jury without proper foundation or authentication and impeded [Keller's] right of confrontation." Keller cites the expert's testimony setting forth some of the specific bylaws that applied to those who were incarcerated and another set of so-called "street bylaws" that applied to those members outside of prison or jail. Keller argues: "As an initial matter, the bylaws were confiscated by prison officials at Chino State Prison from a purported high-ranking [Deadskins] member. . . . This raised foundational problems based on authenticity because [the expert] did not testify that he had personally confiscated the document in Chino, and there was no evidence connecting these bylaws to appellant or any testimony as to the general prison protocol by which inmate letters were monitored, copied, and turned over to authorities." Keller adds that the bylaws are hearsay. Keller argues the court violated his confrontation rights under the federal Constitution by admitting the bylaws, as he could not confront their author. He also argues that "the bylaws were *testimonial* because prison officials are engaged in *fact-collecting* when these documents are confiscated. Such documents are a violation of prison rules and their seizure always makes them part of an investigation into the source and any danger to prison security. They become part of an investigation of criminal

behavior just like a police report because the seizure and the seizing officers and other circumstances are recorded for lawsuit use."

As they did at trial, the People argue the bylaws were sufficiently authenticated under Evidence Code section 1401, they were not hearsay, and they were not testimonial because they were not made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. The People also argue any error was harmless because it is not reasonably probable Keller would have obtained a different result absent the admission of the bylaws.

"Hearsay may be briefly understood as an out-of-court statement offered for the truth of its content. Evidence Code section 1200, subdivision (a) formally defines hearsay as 'evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.' " (*People v. Sanchez, supra*, 63 Cal.4th at p. 674.) "Thus, a hearsay statement is one in which a person makes a factual assertion out of court and the proponent seeks to rely on the statement to prove that assertion is true. Hearsay is generally inadmissible unless it falls under an exception. (Evid. Code, § 1200, subd. (b).)" (*Sanchez, supra*, at p. 674.) We review for an abuse of discretion claims regarding the admission of evidence, including gang evidence. (*People v. Brown* (2003) 31 Cal.4th 518, 547.)

Even if we assume without deciding that the bylaws were hearsay, any error in admitting them will not be disturbed absent a showing of abuse of discretion. Any error was harmless under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, which asks whether it was reasonably probable that a result more favorable to the

appealing party would have been reached absent the error. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1308.) Overwhelming evidence showed that Keller assaulted R.H. to benefit the Deadskins gang. The incident started with the Deadskins demanding money from R.H. to provide benefits for the gang, and ended with the attackers shouting, "Deadskins." The expert testified Keller was a known Deadskins shot caller. Nothing in the bylaws was more prejudicial than the above evidence.

*C. Expert's Testimony Referring to the Surveillance Video*

Keller contends that over his objections, "[i]n this case the prosecution heavily relied on a jail videotape of the events that provided the basis for the instant offenses[,] . . . [the expert] providing a step by step, lengthy, and excruciatingly detailed narration of what was occurring in the tape including identifying the various players and what they were doing moment by moment." Keller further contends that by identifying the victims and other individuals in the videotape, the expert "was doing nothing more than vouching for his own credibility and that of key prosecution witnesses, which in turn bolstered the state's case—the inference being that if [the expert] thought the prosecution witnesses were being candid about their identifications, like [the expert], an officer of the law, then they were being equally candid about what occurred in [the victims' cell] and who was doing what."

The People argue the expert did not opine on the credibility of either R.H. or J.S.: "The prosecutor's questions were intended to assist the jury in better understanding the evidence presented. The detective's complained-of responses provided further clarification about which individuals were depicted in the surveillance video. Indeed, the

surveillance video showed multiple inmates and appellant's appearance had changed by the time of trial. . . . Therefore, the detective's testimony was properly admitted because it helped the jury in understanding the evidence." The People add that even assuming error, Keller suffered no prejudice as the detective's responses were brief and he answered only two questions on this matter, the prosecutor did not refer to the detective's comments during closing argument, the court instructed the jury with CALCRIM Nos. 226 and 332 about how to interpret lay and expert witness testimony respectively, and Keller's identity or presence at the scene were not contested issues.

We set forth the specifically challenged portion of the expert's testimony that referred to the surveillance video:

"[Prosecutor:] Now, speaking of these lineups . . . do you feel confident that you were able to identify the two defendants from that video?

"[Detective:] Correct.

"[Prosecutor:] As well as Kevin Stribling?

"[Expert:] Yes—

[The court overruled the defense objection that the question was argumentative and "bolstering."]

"[Prosecution:] As well as John Cummings?

"[Expert:] Yes.

"[Prosecution:] And the person Henry Vasquez?

"[Expert:] Yes.

"[Prosecution:] All right. Now, the person that . . . [R.H.] identified in those four photo lineups, were they, in fact, the same people that you saw go into Cell 11 on September 9, 2015, from the video surveillance?

"[Expert:] Yes, sir.

[The court overruled objection that the question or answer was "improper"]

"[Prosecution:] And same question, [J.S.] Were the four people that [J.S.] identified, were they the same four people that you were able to identify on the video . . . going into cell 11?

"[Expert:] Yes, they were."

Based on the above colloquy, Keller contends, "The question of witness credibility was exclusively within the jury's province. Allowing [the expert] to attest to his own credibility and that of both prosecution witnesses in this fashion was error."

After reviewing the entire record, we are convinced there is no reasonable chance the outcome of Keller's trial would have been more favorable to him if the court had not admitted the expert's testimony in which he referred to the surveillance video to identify the parties and the incident. As set forth above, the evidence pointing to Keller's guilt was strong. The jury saw the surveillance video several times during trial, including during the testimony of the sheriff's deputy who was on duty the night of the incident and identified those involved in it. At the most, the expert's testimony was cumulative to that of other witnesses. We therefore conclude the court did not commit prejudicial error warranting reversal.

Keller contends the above errors in admitting the expert's testimony were prejudicial and were of "constitutional dimension." The California Supreme Court has stated: "Defendant's argument rests on a claim that certain evidence is simply too prejudicial, and its admission at a criminal trial therefore violates due process. However, as the United States Supreme Court recently stated, '[o]nly when evidence "is so extremely unfair that its admission violates fundamental conceptions of justice," [citation], [has the court] imposed a constraint tied to the Due Process Clause.' " (*People v. Fuiava* (2012) 53 Cal.4th 622, 696.) Here, as stated, the errors were not prejudicial and therefore we reject this claim.

#### V. *Cumulative Error Claim*

We reject Keller's contention that "the cumulative prejudice from evidentiary errors violated [his] right to a fair trial." (Capitalization omitted.) The errors we have found or assumed for purposes of argument were harmless under any standard, whether considered individually or collectively, and they did not deny Keller due process and a fair trial. (See *People v. Martinez* (2003) 31 Cal.4th 673, 704; *People v. Williams* (2009) 170 Cal.App.4th 587, 646; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

#### VI. *Sentencing*

Keller contends we should remand this matter to the trial court to exercise its discretion to strike the five-year sentence imposed for the serious felony strike prior under section 667, subdivision (a) because during the pendency of this appeal, the Legislature passed a law amending section 1385.



On September 30, 2018, the Governor signed Senate Bill No. 1393 (S.B. 1393) which, effective January 1, 2019, amends sections 667 subdivision (a) and 1385 subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the former versions of these statutes, the court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (former § 667(a)), and the court has no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (Former § 1385, subd. (b).)

During the pendency of this appeal, our colleagues in Division Two decided *People v. Garcia* (2018) 28 Cal.App.5th 961, which holds S.B. 1393 is retroactive. In that case, as here, the People have conceded that if defendant's judgment of conviction is not final on January 1, 2019, then S.B. 1393 will apply retroactively to defendant's judgment. (*Garcia*, at p. 973.) The *Garcia* court ruled that "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended S.B. 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when S.B. 1393 becomes effective on January 1, 2019." (*Garcia*, at p. 973; accord, *In re Estrada* (1965) 63 Cal.2d 740, 744-745 ["If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies."]; *People v. Conley* (2016) 63 Cal.4th 646, 657 ["The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends

for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not."].) We agree with the *Garcia* court's analysis; accordingly, we follow it and remand this matter for resentencing.<sup>7</sup>

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<sup>7</sup> We deny Keller's request that we take judicial notice of the California Supreme Court's website docket, as that information is not necessary for the disposition of this appeal.

## DISPOSITION

The sentence is vacated and the matter is remanded to the trial court with directions to permit Keller to bring a motion to dismiss the serious felony prior conviction (section 667, subdivision (a)(1)) in light of Senate Bill No. 1393, and to exercise its discretion as may be appropriate. If the prior conviction is dismissed the court shall resentence Keller accordingly. If the prior conviction is not dismissed the previous sentence shall be reinstated. In all other respects, the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.